INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:

Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227	8
Hargett v. *Summerfield*, 243 F. 2d 29, certiorari denied, 353 U.S. 970	6
Morand Bros. Beverage Co. v. *National Labor Rel. Bd.*, 204 F. 2d 529, certiorari denied, 346 U.S. 909	7
Putnam v. *Ickes*, 78 F. 2d 223, certiorari denied, 296 U.S. 612	8
Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667	8
United States ex rel. Jordan v. *Ickes*, 143 F. 2d 152, certiorari denied, 323 U.S. 759	8

Statutes:

Administrative Procedure Act:	
Sec. 5 (5 U.S.C. 1004)	7
Sec. 10 (5 U.S.C. 1009)	2, 6
Salary Retention Act, 5 U.S.C. 1107	3
28 U.S.C. 1346 (d) (2)	8
Veterans' Preference Act, Sec. 12, 5 U.S.C. 861	3

Miscellaneous:

Administrative Procedure Act, Legislative History, 79th Cong., pp. 202, 261	7
Rules of the Supreme Court, Rule 21 (3)	1

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 95

J. L. HOFFLUND, PETITIONER

v.

FRED A. SEATON, Secretary of the Interior, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court (R. 8-12)[1] is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1A-3A) is reported at 265 F. 2d 363.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1959. The petition for a writ of certiorari was filed on June 5, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

[1] "R." refers to the Joint Appendix in the Court of Appeals filed in this Court pursuant to Rule 21 (3).

QUESTIONS PRESENTED

1. Whether the district court, which declared that petitioner was entitled to a veteran's preference, but could not determine, because of an insufficient administrative record, whether his veteran's preference should have entitled him to be retained in his former position, properly directed the respondents to take administrative action consistent with that declaration.

2. Whether a United States District Court has jurisdiction to declare that a government employee is entitled to additional pay pursuant to the Salary Retention Act.

STATUTES INVOLVED

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in pertinent part:

> Except so far as * * * agency action is by law committed to agency discretion—
>
> * * * *
>
> (e) * * * the reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * * (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; * * *.

STATEMENT

During May 1954, the legal staff of the Department of the Interior was reorganized so as to centralize departmental legal activities in the office of the Solicitor. As part of that reorganization, petitioner was transferred from his position as Chief Counsel of the Defense Minerals Administration, GS-15, to a position within the office of the Solicitor at the same grade he formerly held (R. 3). In March 1956, each of the new positions was allocated a grade; petitioner was designated Attorney Advisor (General) (Assistant Solicitor), GS-14 (R. 4; Pet. App. 1A). Petitioner appealed his down-grading to the Civil Service Commission, which sustained the Interior Department's action (R. 2).

Petitioner then instituted suit in the district court seeking a judgment declaring that his rights under the Veterans' Preference Act, 5 U. S. C. 861, had been violated by the down-grading. Alternatively, he sought (1) a declaration that by the terms of the Salary Retention Act, 5 U. S. C. 1107, he became entitled, on July 1, 1956, to the rate of basic compensation he had previously been receiving as a GS-15, and (2) an order to the respondents to "restore" the back pay allegedly due to him from July 1, 1956 (R. 5-6).

At the conclusion of the trial, the district court rendered an oral opinion, expressly stated to constitute the findings of fact and conclusions of law, in favor of petitioner (R. 8-12). It held, first of all, that Section 12 of the Veterans' Preference Act was

applicable and, consequently, that petitioner was entitled to a veteran's preference (R. 11). On the basis of this declaration, the court held that "the defendants will be required to take appropriate administrative action not inconsistent with this ruling" (R. 11). As to petitioner's claim for a declaration that he was entitled to back pay and an order directing that the back pay be "restored", the court held that it lacked jurisdiction since "It is well established that the Court of Claims has exclusive jurisdiction of actions on the part of government officers and employees for compensation for services" (R. 11).

On the following day, petitioner submitted a proposed judgment in which he included not only the declaration that Section 12 applied and the direction to respondents to take appropriate administrative action consistent with that declaration, but also an order to the respondents to "rescind" petitioner's down-grade and to "restore" him to his former grade of pay (R. 13). The district court struck this last matter from the judgment because it found that it was impossible to determine without further administrative action whether petitioner was entitled to be "restored" (R. 14-15).

On appeal, the judgment of the district court was affirmed. As to petitioner's argument that the district court judgment did not afford him the full relief to which he was entitled, the Court of Appeals stated that it would "not [be] justified in assuming that appellant will not now be accorded full consideration of his status as of March 11, 1956, in accordance

with Section 12 provisions and with appropriate administrative inquiry thereafter as to appellant's rights, if any, which may be derived from the Retention of Salary Act * * *'" (Pet. App. 2A). In addition, the court observed that reliance by petitioner upon the Administrative Procedure Act was misplaced since the function of the federal courts concerning agency personnel actions is merely to "insure compliance by the agency with the statutory and regulatory requirements applicable in situations such as we here consider"[2] (Pet. App. 3A).

ARGUMENT

The court below held that the district court's judgment, ordering the respondents to take further administrative action consistent with the declaration that petitioner is entitled to the protection of Section 12 of the Veterans' Preference Act, was appropriate in the circumstances of this litigation. In addition, it affirmed the lower court's dismissal, for lack of jurisdiction, of petitioner's claim under the Salary

---

[2] On November 7, 1958, the Administrative Assistant Secretary of the Interior Department notified petitioner that, in compliance with the district court order, a retention register for petitioner's competitive area and level, as of March 11, 1956, had been prepared. That register, a copy of which was forwarded to petitioner, showed that, at the time he was down-graded, he was the lowest ranking employee in his area and level.

On March 25, 1959, the Deputy Solicitor of the Department notified petitioner that, because of newly issued Civil Service Commission regulations, he was entitled to Grade 15 salary effective retroactively to August 24, 1958, and that action had been taken properly to adjust his salary.

Retention Act. These holdings are clearly correct and present no conflict of decisions. Accordingly, further review is not warranted.

1. The principal issue involved in this case is extremely narrow. It concerns the relief which the district court afforded petitioner, *i.e.*, a declaration that he was entitled to the protection of Section 12 of the Veterans' Preference Act and a remand to the respondents with instructions to "take appropriate administrative action, consistent with this judgment". Even though the record does not demonstrate that, under the terms of the Veterans' Preference Act, petitioner was entitled to be restored to Grade 15, he nevertheless argues that the district court was compelled to set aside his demotion and restore him to his former grade. The purported basis for this contention is Section 10 of the Administrative Procedure Act, which provides that the reviewing court shall "hold unlawful and set aside agency action * * * found to be * * * not in accordance with law * * * short of statutory right [or] without observance of procedure required by law * * *".

Assuming that the Administrative Procedure Act's judicial review provisions are applicable to employee regrading cases,[3] it is difficult to perceive how the

---

[3] Section 10 of the Administrative Procedure Act, providing for judicial review of agency action, is expressly inapplicable to agency action which "is by law committed to agency discretion". For this reason, it has been held that Section 10 is inapplicable to government personnel cases. *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A. D.C.), certiorari denied, 353 U. S. 970. And compare the explanation by both the Senate and House Committees on the Judiciary for the

terms of the Act were violated. The court did hold that the failure to follow Section 12 of the Veterans' Preference Act was unlawful. However, without further fact finding by the agency, it was impossible to determine whether petitioner's regrading would have resulted even if the Section 12 procedures had been applied. Indeed, for the district court to have done otherwise would have been to disregard (*Morand Bros. Beverage Co.* v. *National Labor Rel. Bd.*, 204 F. 2d 529, 532 (C.A. 7), certiorari denied, 346 U.S. 909)

> a basic tenet in our federal system of administrative practice and review. The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to that of a United States District Court. * * * The full implication of this relationship is realized when, as here, the occasion arises for the reviewing court to state what it believes to be the substantive law applicable to a particular controversy but finds that the lower tribunal has not conclusively found the facts to which this law should be applied. The result then, in view of the rule that a reviewing court shall not enter initial findings of fact, is an order remanding the cause "for

---

exemption of government personnel proceedings from the requirements for "adjudications" provided by Section 5 of the Administrative Procedure Act, 5 U.S.C. 1004 (Administrative Procedure Act, Legislative History, 79th Cong., pp. 202, 261): "because the selection and control of public personnel has been traditionally regarded as a discretionary function which, if to be overturned, should be done by separate legislation."

further proceedings in conformity with the decision of this court." * * *

2. Petitioner is also in error in contending that the district court had jurisdiction to declare that he was entitled to be paid as a GS-15 from the date of his demotion. The district court, of course, does not have jurisdiction over actions brought by a government employee to recover compensation. 28 U. S. C. 1346 (d) (2). And it is well established that the Declaratory Judgments Act does not give the courts jurisdiction where an action for affirmative relief otherwise would not lie. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667; *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227; *United States ex rel. Jordan* v. *Ickes*, 143 F. 2d 152 (C.A. D.C.), certiorari denied, 323 U. S. 759; *Putnam* v. *Ickes*, 78 F. 2d 223 (C.A. D.C.), certiorari denied, 296 U. S. 612.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
SETH H. DUBIN,
Attorneys.

JULY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959 512360 1685